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In The

Supreme Court of the United States

October Term, 1978

No. 78-494

TEXTRON, INC., BELL HELICOPTER TEXTRON,
A DIVISION OF TEXTRON, INC.,
Petitioner,

v.

THE UNITED STATES OF AMERICA
AND
THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals may may be found at 577 F.2d 1163 (4th Cir. 1978).

QUESTION PRESENTED

Has the Commonwealth of Virginia waived its immunity from suit guaranteed by the Eleventh Amendment to the United States Constitution by training its organized militia, the Virginia National Guard?

STATEMENT OF THE CASE

These actions were originally commenced by the estates of James Henry and Philip Ramsey against petitioner Bell Textron on December 22, 1976, seeking damages for the death of both decedents in an accident on January 23, 1976, involving a United States Army helicopter assigned to the Virginia Army National Guard. Jurisdiction was founded on 28 U.S.C. § 1331. Decedents Henry and Ramsey were the pilots of the helicopter and were performing inactive drill status duty for training as members of the Virginia Army National Guard at the time of the accident. Each of the complaints alleged that Bell Textron negligently designed and manufactured the aircraft, breached express and implied warranties, and was responsible to plaintiffs on a theory of strict liability.

Petitioner Bell Textron filed answers to the complaints denying these allegations and thereafter served and filed third-party complaints pursuant to Rule 14 of the Federal Rules of Civil Procedure seeking indemnity and/or contribution for any recovery by plaintiffs from the respondent Commonwealth and the respondent United States. Jurisdiction was founded on 28 U.S.C. § 1331.

The Commonwealth filed a Motion to Dismiss the third party complaint against her, which was granted by the District Court by Order dated April 11, 1977. (Petitioner's Appendix, p. 22a) Petitioner filed a timely Notice of Appeal. After the District Court dismissed the third party complaint against the United States on July 25, 1977, the Court of Appeals consolidated all cases for the appeal. On July 29, 1978, the decisions of the District Court were affirmed. *Textron, Inc.* v. *Virginia National Guard, et al.*, 577 F.2d 1163 (4th Cir. 1978).

ARGUMENT

Bell Textron concedes that the Commonwealth of Virginia has adopted neither a constitutional provision nor a statute expressly waving its immunity to lawsuits sounding in tort. And the Eleventh Amendment to the U.S. Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Bell Textron suggests, however, that the Commonwealth has waived her sovereign immunity under the principle established in *Parden* v. *Terminal Railway,* 377 U.S. 184, 84 S.Ct. 1207 (1964), minimizes the importance of *Employees* v. *Missouri Public Health Department,* 411 U.S. 279, 93 S.Ct. 1614 (1973), and wholly ignores the amplification on those cases in *Edelman* v. *Jordan,* 415 U.S. 651, 94 S.Ct. 1347 (1974).

Both *Parden* and *Employees* involved congressional enactments which authorized suits against a general class of defendants which could include states. "The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on *whether Congress had intended to abrogate the immunity in question,* and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." *Edelman, supra,* at 673 (emphasis added).

The Court of Appeals properly affirmed the dismissal of this action because it fails to state a claim for two reasons. First, Bell Textron cannot overcome the threshold fact that there is no congressional authorization to sue a class of defendants which includes the Commonwealth of Virginia for

acts arising out of National Guard activities. This precludes any reliance on *Employees* or *Parden. Edelman, supra,* at 672. Second, there is no federal statute which evidences a congressional intent to condition federal financial assistance upon a waiver of sovereign immunity. As the majority opinion in *Employees* put it:

> "Congress, acting responsibly, would not be presumed to take such action silently.
>
> * * *
>
> "It would also be surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without . . . indicating in some way by clear language that the constitutional immunity was swept away." *Id.* at 284-285.

Mere participation in a federal program does not establish consent on the part of the State to be sued in federal court. *Edelman* v. *Jordan, supra; Daye* v. *Commonwealth of Pennsylvania,* 483 F.2d 294 (3rd Cir. 1973), cert. den. 416 U.S. 946; *Lumbermans Mutual Casualty Company* v. *Fugate,* 569 F.2d 213 (4th Cir. 1978).

The conceptual flaw underlying Bell Textron's position is the notion that either the United States or the Commonwealth of Virginia must be liable to suit. It is entirely possible that neither is. The inquiries are separate, not interrelated. Whatever liability the United States may have must be derived from the consent to be sued contained in the Federal Tort Claims Act, 28 U.S.C. § 2674. (Virginia has no similar statute.) Whether the doctrine enunciated in *Feres* v. *United States,* 340 U.S. 135, 71 S.Ct. 153 (1950), and *Stencel Aero Engineering Corporation* v. *United States,* 431 U.S. 666, 97 S.Ct. 2054 (1977), is applicable to remove this action from the class of suits to which the United States has consented to be sued will not alter the immunity enjoyed by the Commonwealth and recognized by the Eleventh Amendment. *Maryland* for the Use of *Levin* v. *United States,* 381 U.S. 41, 85 S.Ct. 1293 (1965), *judgment vacated in order to direct remand for further proceedings on unresolved issues,* 382 U.S. 159 (1965), is illustrative of this point. In that case, the petitioners' descendents were the victims of an accident caused by a Maryland Air National Guard officer who was also a civilian employee of the National Guard. The petitioners brought suit under the Federal Tort Claims Act. The Court described the symbiotic relationship between the states and the federal government in National Guard matters. In holding that under the then-applicable law, both military and civilian personnel of the National Guard are to be treated for the purposes of the Federal Tort Claims Act as employees of the states and not of the federal government, the Supreme Court recognized that its decision left those who had suffered from that accident without effective legal redress for their losses. There was no hint that, since the Federal Tort Claims Act was inapplicable, and by virtue of National Guard activities, the State of Maryland could be considered to have waived her sovereign immunity. The implication is clearly to the contrary, since the court noted in footnote 39 that "the State of Maryland has not, so far as we know, waived its sovereign immunity." Thus a state's waiver of sovereign immunity for actions arising out of National Guard activities remains a question for resolution by the individual state.

In its petition, Bell Textron argues that Virginia, in training the modern militia reserved to the state, is somehow an interloper in an exclusive federal sphere. The short answer is that this sphere is exclusive to neither the federal government nor the state, since both the state and the nation have legitimate interests therein. Characterizing this con-

stitutionally reserved activity as proprietary is likewise erroneous. The crucial question, however, is whether Congress intended that states would be liable to suit for actions arising from National Guard activities. The answer clearly is in the negative.

The necessary predicate to the judicial legislation on indemnity and contribution requested by Bell Textron in this case is jurisdiction as to the Commonwealth. Labeling the relief "equitable" does not avoid this deficiency. *Edelman* v. *Jordan, supra.*

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals was correct, and the petition for certiorari should be denied.

Respectfully submitted,

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